

En Banc Fifth Circuit Finds Competitive Injury Necessary to State Packers and Stockyards Act Claim, Reversing Panel Opinion

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The United States Court of Appeals for the Fifth Circuit, en banc, has now conclusively ruled that, "the purpose of the Packers and Stockyards Act of 1921 [PSA] is to protect competition and, therefore, only those practices that will likely affect competition adversely violate the Act." In so holding, the en banc court overturned a panel opinion of the same court from July 2008, but aligned circuit precedent with that of every other circuit court of appeals to have addressed the question.

In a surprising decision, the Fifth Circuit panel had ruled that a grower-plaintiff alleging a violation of the PSA's prohibitions against "unfair, unjustly discriminatory, or deceptive practice[s]" and "undue or unreasonable preferences or advantages" among growers (7 U.S.C. Section 192(a)-(b)) need not show that the challenged practice has any adverse effect on competition. In so holding, the Fifth Circuit panel (covering the states of Texas, Louisiana and Mississippi) acknowledged that it was creating a circuit split with all five of the other circuit courts of appeal which have addressed this issue.

The PSA has long been viewed as Congress's response to concerns over monopolistic practices in the meatpacking industry, and complementary to the more generally applicable antitrust laws that preceded it, the 1890 Sherman Act and the 1914 Clayton Act. Because of that background, other circuit courts have applied general antitrust principles requiring plaintiffs to show an adverse effect on competition from challenged practices (outside of a narrow realm of per se illegal conduct such as horizontal price fixing).

In its 9 -7 en banc decision reversing the panel, the majority of the sitting judges of the Fifth Circuit pointed to several factors driving their decision that, "an anti-competitive effect is necessary for an actionable claim under the PSA" First was the legislative history of the statute and an early Supreme Court decision finding it constitutional. The Fifth Circuit found that the statute was indisputably a response to monopolistic and anticompetitive practices in the meat-packing industry early in the last century, and that the Supreme Court upheld it as being consistent in its regulation of that industry with the broader Sherman Act governing interstate commerce in general (the Act was later broadened to include poultry processors as well). Next, the Fifth Circuit reviewed the decisions of other circuits, notably "[t]he Seventh Circuit, where great packing companies have resided, [and which] fielded most of the early cases applying the PSA." Finding uniformity in its sister circuits that proof of an adverse effect on competition by a challenged practice was necessary to state a claim under the Act, the Fifth Circuit majority found not only the reasoning of the other courts of appeals persuasive, but also found value in uniformity among the courts to a business person seeking to conform their conduct to the Act's requirements, stating, "he could not expect a judge to interpret the statute by looking at the bare words of [the Act]. Surely he would predict that the next court judgment would be consistent with the judgments of the other circuits."

While the dissent criticized the majority for purportedly not following the plain language of the statute, the Fifth Circuit opinion continues a long trend of antitrust jurisprudence relying on the rule of reason to assess whether a particular restraint of trade is unlawful, as unreasonably interfering with competition, or is the result of a reasonable business justification. In light of the reemergence of uniformity among the federal courts of appeal on the interpretation of the PSA, it is unlikely that further review by the Supreme Court will occur. Click [here](#) to read the full text of the opinion.

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